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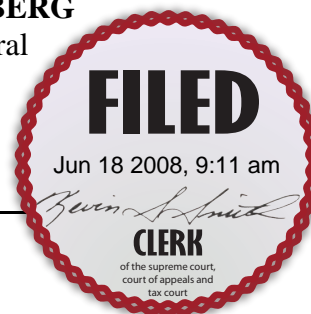
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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL MODLIN,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 03A01-0712-CR-536

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0703-FA-402

June 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Michael Modlin appeals the sentence he received after pleading guilty to one count of class A felony child molesting.¹ We affirm.

Issues

Modlin presents two issues, which we restate as follows:

- I. Whether the court was within its discretion when it ordered a forty-year sentence with no time suspended; and
- II. Whether his sentence is appropriate in light of the nature of the offense and his character.

Facts and Procedural History

According to the factual basis, one day in February 2007, while at his Edinburgh residence, thirty-eight-year-old Modlin placed his mouth on the penis of his twelve-year-old stepson, J.S. Tr. at 12. On March 5, 2007, the State charged Modlin with two counts of child molesting, one as a class A felony, and the other as a class C felony. App. at 1, 5-8.

On September 16, 2007, the State offered to dismiss the C felony and never to file additional charges in the matter if Modlin would plead guilty to the A felony. *Id.* at 31. On October 15, 2007, a written plea agreement, which reflected those terms and set out the potential range of sentence as “20-50” years, was filed with the court. *Id.* at 32-35.

On November 13, 2007, the court held a hearing at which Modlin did not offer witnesses or present evidence outside of the testimony he gave in his presentence report. Tr.

¹ See Ind. Code § 35-42-4-3(a)(1) (“A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting,” a class A felony if “committed by a person at least twenty-one (21) years of age[.]”).

at 18. Defense counsel offered its argument, yet candidly admitted that “based on [Modlin’s] criminal past [which includes child molesting convictions], an aggravated sentence is probably within the Court’s discretion.” *Id.* at 19. Stressing that Modlin’s sentence is “non-suspendible” due to his prior felony convictions and focusing on Modlin’s failure to learn from his previous treatment to prevent child molesting, the State strenuously argued for a maximum sentence. *Id.* at 20; *see* Ind. Code § 35-50-2-2(b)(1) (“court may suspend only that part of the sentence that is in excess of the minimum sentence” if the crime committed was a class A felony and the person has a prior unrelated felony conviction).

In explaining its sentencing decision at length, the court began with the potential mitigator that Modlin pled guilty to the higher charge. However, the court gave it little weight because Modlin received the “bargain” of dismissal of the C felony and the State’s promise to “forever refrain from filing any additional charges related to any acts involving” J.S. Tr. at 22; *see* App. at 31. The court mentioned Modlin’s employment and possible financial support of his dependent as a potential mitigator, but found it “offset by the risk of molestation.” Tr. at 23.

The court found Modlin’s prior convictions for child molesting to be “an extremely aggravating circumstance.” *Id.* The court cited the repetitive and long-term nature of the present case and the violation of Modlin’s position of trust as very aggravating circumstances. *Id.* at 24-25. The court viewed Modlin’s previous criminal history as highly predictive of future similar criminal behavior. *Id.* at 25, 27. Acknowledging the general presumption that previous success on probation may be indicative of future success, the court doubted that such would be the case with Modlin, who, in spite of previous treatment, had

reoffended when not closely monitored. *Id.* at 26-27.

In the end, the court found the aggravating circumstances to be “extremely aggravating” and to “significantly outweigh the mitigating circumstances.” *Id.* at 28. Without minimizing the “horrible” nature of Modlin’s crime, the court opined that it was “not the worst of the worst,” and thus did not merit a maximum sentence. *Id.* Accordingly, the court ordered a forty-year sentence for Modlin’s class A felony.² The court went on:

Now *one of the other factors* the Court considers with regard to whether any of that should be suspended is that there is a program that is designed by the Indiana Department of Correction which have the initials of S-O-M-M, And it is a very specific program, long term, which is specifically designed to meet the peculiar of [sic] . . . child molesting perpetrators. And I believe that that program is much more equipped to deal with persons than our local probation department especially for an offender such as Mr. Modlin because Mr. Modlin appears to be a pedophile. Now that term is thrown around way too liberally as far as I’m concerned because not all persons who commit one of the various ways to commit child molesting are pedophiles. My non-psychology major definition is someone who is committed to doing this and pretty much has a lifetime predisposition to do so in spite of interventions and sanctions will not change the way he does business. So because of that, the Court believes that you are [a] pedophile. Not just a one-time molester. Not just someone who had an opportunity that came upon them out of the blue. . . . And because of that, I do not believe that any portion of the sentence should be suspended because I believe that the appropriate and best programs available to deal with someone who is a pedophile are available through the Department of Correction. And those programs as I understand it are not put into place if there is a sentence which includes what we would call a split sentence for probation at the conclusion of incarceration.

Id. at 29-30 (emphasis added).

Ultimately, the court issued a written sentencing order, which committed Modlin to the Department of Correction for forty years with “no time suspended.” App. at 37.

² See Ind. Code § 35-50-2-4 (“A person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years.”).

Discussion and Decision

I. No Abuse of Discretion

Modlin asserts that the court abused its discretion in ordering a forty-year, fully executed sentence rather than suspending a portion of it. He faults the court for relying on information about “SOMM” when the details about the program, including its full name, “Sex Offender Management & Monitoring,”³ were not introduced into evidence at the sentencing hearing.

Where, as here, a defendant’s sentence is within the statutory range, the trial court’s sentencing decision is subject to review only for abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218. A trial court may impose any legal sentence “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” Ind. Code § 35-38-1-7.1(d). A trial court is still required to issue a sentencing statement when sentencing a defendant for a felony. *Anglemyer*, 868 N.E.2d at 490. “If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating.” *Id.* The trial court may abuse its discretion if it omits “reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.” *Id.* at 490-91.⁴ To demonstrate an abuse of discretion, Modlin must show that the trial court’s decision

³ See *Doe v. Donahue*, 829 N.E.2d 99, 105 (Ind. Ct. App. 2005) (discussing SOMM), *trans. denied*.

⁴ As per *Anglemyer*, the imposition and review of sentences should proceed as follows:

is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Hollin v. State*, 877 N.E.2d 462, 464 (Ind. 2007).

Implicit in Modlin’s sentencing argument is a challenge to the court’s finding that he is a pedophile likely to reoffend. Appellant’s Br. at 9-11. The presentence report, which Modlin believed was accurate save one minor error,⁵ outlined his background as follows. Modlin’s record contains two class C felony convictions for molesting his first wife’s twelve-year-old brother, D.T., in two different counties. According to an affidavit, Modlin had tied D.T. to a bed, performed oral sex on him, attempted anal sex, and engaged in other incidents involving oral-genital contact during the summer of 1992. Following guilty pleas, Modlin received consecutive four-year sentences, with one year suspended.

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1. The trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence.
 2. The reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion.
 3. The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse.
 4. Appellate review of the merits of a sentence may be sought on the grounds outlined in Appellate Rule 7(B).

868 N.E.2d at 491.

⁵ The purpose of a pre-sentence investigation is “to provide information to the court for use at individualized sentencing,” *Robeson v. State*, 834 N.E.2d 723, 725 (Ind. Ct. App. 2005), *trans. denied*, and “to ensure the court has before it all relevant information about the defendant’s background it needs to formulate an appropriate sentence,” *Hulfachor v. State*, 813 N.E.2d 1204, 1207 (Ind. Ct. App. 2004); *see also* Ind. Code §§ 35-38-1-8, -9(b)-(c), -12. Moreover, “[t]his court has held that if a defendant confirms the accuracy of a presentence report when given an opportunity to contest it, such confirmation amounts to an admission of information contained in the report for *Blakely* purposes.” *Sullivan v. State*, 836 N.E.2d 1031, 1036 (Ind. Ct. App. 2005) (citing *Carmona v. State*, 827 N.E.2d 588, 596-97 (Ind. Ct. App. 2005)); *cf Ryle v. State*, 842 N.E.2d 320, 323 n.5 (Ind. 2005) (noting that “using a defendant’s failure to object to a presentence report to establish an admission to the accuracy of the report implicates the defendant’s Fifth Amendment right against self-incrimination.”). Unlike in *Ryle* where the defendant simply failed to object to a report, Modlin and his counsel reviewed his presentence report, made a correction (to the age of Modlin’s dependent

After serving time for molesting D.T.,⁶ Modlin was placed on probation, a condition of which was to complete a three-year sex offender program. Modlin finished the program in 1999, around the same time that he met a woman with two young children. Despite his admission that he is attracted to boys and girls in the ten-to-twelve age range, and disregarding the triggers he had been taught to avoid, Modlin became involved with and then married this woman. Around 2002, Modlin began molesting J.S., who was then six years old. Six years later, Modlin's weekly molesting of his stepson finally came to a halt when a concerned relative contacted authorities.⁷

We view the court's reference to Modlin as a pedophile to be simply its assessment of the information before it. We see no abuse of discretion in the court's use of this term given these circumstances. *See also* Black's Law Dictionary 1167 (8th ed. 1999) (defining pedophile as an adult who engages in pedophilia, which it defines as an "adult sexual disorder consisting in the desire for sexual gratification by molesting children, esp. prepubescent children").

As for the decision not to suspend any portion of Modlin's enhanced sentence, the court did not rely exclusively on the SOMM program. Rather, the court clearly stated it was "one of the factors" it was considering. Tr. at 19. The court also was troubled by the fact that the prior sex offender program, which Modlin completed after serving his sentences for

child), and affirmed its accuracy. Tr. at 18. As such, we are comfortable with the court's reliance upon its contents. We also note that Modlin made no *Blakely* argument.

⁶ D.T. has since served a sentence at the Indiana Department of Correction, but his current legal status is unknown.

⁷ J.S. had never reported the incidents because he was afraid that if Modlin went to jail, his

molesting D.T., had not altered his behavior. That is, when close monitoring ceased, Modlin ignored the information he had learned about risky circumstances and boundaries, became involved with a woman with small children, and started molesting again. This demonstrated high risk to reoffend also weighed in favor of a non-suspended sentence.

As for the lack of “evidence” regarding SOMM, Modlin made no objection to this effect during his sentencing hearing. Perhaps this is because the rules of evidence do not apply to sentencing proceedings. Ind. Evidence Rule 101(c)(2). Moreover, a sentencing hearing is not a criminal prosecution within the meaning of the Sixth Amendment because its sole purpose is to determine only the appropriate punishment for the offense. *See Debro v. State*, 821 N.E.2d 367, 374 (Ind. 2005). Thus, the Confrontation Clause does not apply to sentencing proceedings. *Id.* at 373.⁸ Furthermore, while a person is “entitled to subpoena and call witnesses and to present information in his own behalf” during a sentencing hearing, Indiana Code Section 35-38-1-3, Modlin chose to “rely on his testimony given in the pre-sentence report” and his defense counsel’s argument. Tr. at 18. To the extent Modlin attempts to introduce new evidence within his appellant’s brief, he is too late. In any event, Modlin has not shown that the court’s sentencing decision was “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *See Hollin*, 877 N.E.2d at 464.

unemployed mother would have no way of supporting herself.

⁸ Our supreme court in *Debro* specifically declined to determine whether the Indiana Constitution “affords a defendant a right of confrontation in a sentencing hearing.” 821 N.E.2d at 374. Modlin makes no argument that it does, so we need not address this point. *See Greeno v. State*, 861 N.E.2d 1232, 1233 n.1 (Ind. Ct. App. 2007) (holding that defendant waived argument under Indiana Constitution by failing to provide separate analysis).

II. Appellate Rule 7(B)

Citing Indiana Rule of Appellate Procedure 7(B), Modlin maintains that his sentence was inappropriate. Specifically, he argues that he did not plead guilty to criminal activity covering five years or five separate days, thus the court should not have considered the repetitive, long-term factor. He focuses on the fact that his criminal record “shows no drug violations, no history of violence – nothing else to suggest he cannot be and has not been a valuable citizen.” Appellant’s Br. at 5. Modlin points out that he did not threaten harm, and he attempts to downplay his position of trust because “[i]t is not unusual that the victim was a family member” in a case of child molesting. *Id.* at 6.

Indiana Appellate Rule 7(B) allows a court on review to revise a sentence if the sentence is inappropriate in light of the nature of the offense and the character of the offender. Although Rule 7(B) does not require this court to be extremely deferential to a trial court’s sentencing decision, this court still gives due consideration to that decision. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). This court also recognizes the unique perspective a trial court brings to its sentencing decisions. *Id.* The defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate. *Krempetz v. State*, 872 N.E.2d 605, 616 (Ind. 2007).

In *Anglemyer*, the court stated that “regarding the nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” 868 N.E.2d at 494. As noted *supra*, the advisory sentence for a class A felony is thirty years, with a range from twenty to fifty years. Ind. Code § 35-50-2-4.

It is true that having pled guilty to one count of class A child molesting, Modlin could

not be sentenced for multiple counts of molesting. Accordingly, it would have been improper for the court to have ordered dozens of forty-year sentences as punishment for the weekly molestations that occurred during the six years before J.S.'s silence was broken. On the other hand, it is perfectly acceptable for a court to examine the nature of the offense. Here, the particular incident was not an isolated instance of mistaken judgment, but one in a very long series of molestations that occurred during half of Modlin's stepson's twelve years of life. *See Roney v. State*, 872 N.E.2d 192, 200 (Ind. Ct. App. 2007) (noting the court is permitted to consider uncharged misconduct when enhancing a sentence, and quoting *Ridenour v. State*, 639 N.E.2d 288, 297-98 (Ind.Ct.App.1994), as follows: "The fact that Ridenour committed other, uncharged, incidents of molestation with the same victim is a valid factor to consider in aggravation."), *trans. denied*.

We are likewise unimpressed with Modlin's assertion that he made no threats. Given J.S.'s concern for his mother's continued support, coupled with Modlin's position of trust, no threats were needed to achieve Modlin's desires. And, while we agree that the position of trust factor is all too common in child molesting cases, this does not somehow make it inconsequential. Indeed, as a result of Modlin's actions, J.S. attends counseling sessions at a hospital every other week and no longer has a relationship with his mother.

Turning to the character of a defendant, we often look at criminal history. Our supreme court has emphasized that "the extent, if any, that a sentence should be enhanced [based upon prior convictions] turns on the weight of an individual's criminal history." *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). "This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense,

and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006); *Prickett v. State*, 856 N.E.2d 1203, 1209 (Ind. 2006).

Despite Modlin's attempts to paint a different picture of his character, his criminal history is significant. While we have been presented with no written records indicating that Modlin has been involved with drugs or violence, the history that he does have is telling. Without rehashing the details, we summarize: in 1992, Modlin committed strikingly similar crimes, molesting another twelve-year-old boy, while in a position of trust. At that time, he was given the privilege of probation and provided with treatment. Modlin's response to these opportunities was an almost immediate return to molesting a child within his care.

In reviewing the nature of the offense committed by Modlin and his character, we conclude that he has not met his burden of demonstrating that his enhanced, but not maximum, forty-year sentence was inappropriate *Singer v. State*, 674 N.E.2d 11, 14 (Ind. Ct. App. 1996) (affirming 100-year sentence for father who molested twin daughters for six years, beginning when they were six years old, albeit applying previous standard); *see Southern v. State*, 878 N.E.2d 315 (Ind. Ct. App. 2007) (affirming 40-year sentence for class A child molesting), *trans. denied*.

Affirmed.

BARNES, J., and BRADFORD, J., concur.